Fair Work Amendment Bill 2012

Submission to the Senate Education, Employment and Workplace Relations Committee

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1. Introduction

Job Watch Inc (**JobWatch**) welcomes this opportunity to make a submission to the Senate Education, Employment and Workplace Relations Committee's inquiry into the *Fair Work Amendment Bill 2012* (Cth) (**the Bill**). JobWatch supports most of the proposed amendments contained in the Bill but nevertheless has concerns regarding certain proposed amendments in relation to:

a) Time limits for Unfair Dismissal and General Protections applications;
b) Costs orders against lawyers;
c) Renaming Fair Work Australia; and
d) Clarifying the application of workplace rights in General Protections matters.

2. About JobWatch

JobWatch is an employment rights community legal centre which is committed to improving the lives of workers, particularly the most disadvantaged. It is an independent, not-for-profit organisation which is a member of the Federation of Community Legal Centres (Victoria).

JobWatch was established in 1980 and is the only service of its type in Victoria. The centre is funded by State and Federal funding bodies to do the following:

a) Provide information and referrals to Victorian workers via a free and confidential
b) telephone information service;
c) Engage in community legal education through a variety of publications and interactive seminars aimed at workers, students, lawyers, community groups and other organisations;
d) Represent and advise disadvantaged workers; and
e) Conduct law reform work with a view to promoting workplace justice and equity for all Victorian workers.

Since 1999, we have maintained a comprehensive database of the callers who contact our telephone information service. To date we have collected over 150,000 caller records with each record usually canvassing multiple workplace

problems including, for example, contract negotiation, discrimination, bullying and unfair dismissal. Our database allows us to follow trends and report on our callers' experiences, including the workplace problems they face and what remedies, if any, they may have available at any given time.

The contents of this submission is based on the experiences of callers to and clients of JobWatch and the knowledge and experience of JobWatch's legal practice.

3. Unfair Dismissal and General Protections time limits – No case for change

JobWatch is concerned about proposed amendments to the *Fair Work Act* 2009 (Cth) (**FW Act**) seeking to change the Unfair Dismissal and General Protections' time limits for filing applications at Fair Work Australia (**FWA**). In JobWatch's opinion, the current system is working well in relation to time limits for Unfair Dismissal (14 days) and General Protection applications (60 days) where a worker has been dismissed. These time limits are also now well known in the community and any tinkering with them should not be done without reasonable cause.

Currently, for example, if a worker who has been dismissed believes their dismissal was due to their pregnancy but was not given any reasons for their dismissal, the worker can make either an Unfair Dismissal claim (if eligible) or a General Protections claim because their dismissal is both, harsh, unjust or unreasonable and unlawful adverse action. In this type of scenario, eligible Applicants will often file an Unfair Dismissal claim because of the 14 day time limit so as to preserve their rights whilst they obtain advice about their legal options.

Often, during the Unfair Dismissal telephone conciliation (which usually occurs 2-3 weeks after filing) and in the light of the Respondent employer's response, further issues can be explored which, if the matter can't be resolved, may result in the Applicant discontinuing their Unfair Dismissal claim and filing a General Protections application where it appears to be the better course of action. Of course, most matters resolve at the conciliation stage. In 2011-2012

the annual Fair Work Australia report stated that 81% of Unfair Dismissal applications settle at conciliation.[1]

Employers are not and cannot be "hit" with an Unfair Dismissal claim and a General Protections claim at the same time as multiple actions regarding termination are precluded by section 725 and related sections of the FW Act.

4. Proposed changes – Consequences of aligning Unfair Dismissal and General Protections time limits at 21 days

If the Applicant employee in the above example was forced to choose to make either an Unfair Dismissal claim or a General Protections claim before filing their claim because the time limits for filing both claims have been aligned at 21 days, it may be that she would choose to make a General Protections claim thereby depriving both parties of the chance to resolve the matter expeditiously and inexpensively via FWA's Unfair Dismissal telephone conciliation service.

The Respondent employer's legal costs would also be much higher as, in the Federal Court or the Federal Magistrates Court, an incorporated employer (which most are) cannot take any steps in the legal proceeding except by way of a lawyer. In other words, the Respondent employer cannot choose to represent themselves as they can do at FWA. Additionally, the remedies that Respondent employers are exposed to in General Protections claims are much broader than in Unfair Dismissal claims and compensation for both economic loss and pain and suffering is not capped. Penalties can also be ordered against the employer as well as individuals involved in the contravention.

In JobWatch's opinion, aligning the Unfair Dismissal and General Protections time limits for filing at 21 days will have the effect of increasing the number of General Protections claims being made. Surely, this is not in the interests of employers.

Therefore, in JobWatch's opinion, the current time limits are working well as they provide applicants with access to FWA's excellent telephone conciliation

[1] Fair Work Australia, 'Fair Work Australia Annual Report 2011-2012' (Fair Work Australia, 25 September 2012), 28 <http://www.fwa.gov.au/documents/annual_reports/ar2012/FWA_Annual_Report_2011-12.pdf>.

service without giving up their right to commence a General Protections application when their matter cannot initially be resolved. This is in the interests of both employers and employees. Consequently, JobWatch strongly supports the General Protection applications time limit remaining at 60 days from the date of dismissal. Nevertheless, JobWatch is not opposed to the recommendation that Unfair Dismissal application time limits be extended from 14 to 21 days.

5. Suggested procedural improvements

Under the proposed changes, it appears that the Applicant will be required to elect to file either an Unfair Dismissal or General Protections application at the time of filing their application. If this is the case, JobWatch strongly opposes this proposal.

If the time limits for filing Unfair Dismsisal and General Protections claims are aligned at 21 days then JobWatch suggests that Applicants be able to pursue both an Unfair Dismissal and a General Protections claim at the same time to the point of conciliation or conference at FWA. This has been the case in the past at FWA's predecessor including under the 'Workchoices' reforms.

After conciliation or conference, the Applicant can then have a period of time, e.g. 7 or 14 days, to elect to either continue with an Unfair Dismissal claim at FWA or make a General Protections application to an eligible court. If the Applicant elects to pursue a General Protections application, FWA can then produce a certificate as required by section 369 of the FW Act. There may also need to be some consequential amendments to the FW Act (e.g. to section 725 and related sections) and/or the Rules to deal with such procedural issues.

Nevertheless, JobWatch believes it is important that Applicants be provided with the opportunity to decide which course of action to take after receiving a response from the Respondent employer and discussing relevant matters at a FWA conciliation or conference.

6. Costs orders against lawyers

JobWatch opposes any amendments to the FW Act that make it easier to obtain costs against a party's lawyer for the following reasons:

a) The threat of legal costs against a lawyer personally has the capacity to influence the legal advice provided by that lawyer to their client. Put simply, this is antithetical to the concept of justice. Lawyers should not have to be concerned about their own financial vulnerability when representing a party at FWA. Instead, lawyers should be free to provide accurate legal advice and to advocate competently in accordance with all their duties, including duties owed to their clients, without the threat of being sued personally for the other party's legal costs.

b) Further, it is not uncommon for some legal representatives to threaten costs against an Applicant's lawyer for strategic purposes as a matter of course. For example, recently the writer (who is a Principal Lawyer of a Community Legal Centre) received a letter from a peak employer group who was acting for the Respondent in an unfair dismissal case threatening costs against the writer personally. The matter ultimately turned on the reliability of evidence provided by the witnesses at the hearing (as is often the case) and, as a result, FWA dismissed the application. No application for costs was ever made by the Respondent.

c) JobWatch is concerned that the potential for costs to be awarded against lawyers prevents or severely limits the number of genuine "public interest" or "test cases" for which a hearing or arbitration is required to clarify the law. On this view, JobWatch further opposes any amendments that make it easier to obtain costs orders against lawyers.

d) The wording of section 401(1A)(a) being that: 'the representative encouraged the person to start, continue or respond to the matter and it should have been reasonably apparent that the person had no reasonable prospect of success in the matter' would clearly discourage public interest/test cases because such cases often fail at the first instance thereby exposing the lawyer to an order for costs against them personally. If public interest/test cases are not run by lawyers, then workplace law will

not evolve and FWA will risk becoming out of touch with modern Australian workplaces.

7. Recommendations as to costs against lawyers

1. The ability of FWA to order costs against lawyers should be repealed.

2. FWA already has the power to refuse to grant a lawyer acting permission to appear. The prospects of success of a matter and its public interest/test case credentials could be made grounds that FWA may consider when deciding to grant permission to appear under section 596.

3. Section 404 of the FW Act allows for a procedure for security of costs in Unfair Dismissal applications. This section could be better utilised by FWA and Respondent employers to discourage clearly unmeritorious Unfair Dismissal claims.

4. FWA should be empowered to make "protective costs orders" in terms similar to the Federal Court of Australia whereby an Applicant in a public interest/test case can apply to FWA for an order that costs will not be ordered or for there to be a limit on the amount of costs that may be ordered.

5. If FWA retains its power to order costs against lawyers, it should only be empowered to order costs against law firms and not individual employed lawyers acting under the direction of partners or principals.

8. Renaming Fair Work Australia

JobWatch has anecdotal evidence from its telephone information service that many callers are confused about which agency they should be dealing with due to the use of "Fair Work" in the names of Fair Work Australia (FWA) and the Office of the Fair Work Ombudsman (FWO). Adding to this confusion are the names of the Office of the Fair Work Ombudsman's telephone contact centre being the Fair Work Infoline and FWA's Fair Work Australia Helpline. This confusion will be further exacerbated when Safe Work Australia becomes

operational. For example, only recently a client of JobWatch's legal practice completed an FWO Workplace Complaint form thinking that it was an unfair dismissal claim form. The President of FWA has himself highlighted these issues as clearly it is difficult for individuals unfamiliar with the Australian industrial relations landscape to navigate their way to the appropriate destination.

Unfortunately, renaming Fair Work Australia (FWA) as the Fair Work Commission (FWC) will not alleviate this problem, nor will it assist in addressing perceptions, however unfounded, that the "impartial workplace umpire" that is FWA is somehow aligned with Government policy.

JobWatch suggest that in renaming FWA the word "Fair" should be omitted so as to better alleviate these issues.

9. General Protections – clarifying the application of workplace rights

Whilst JobWatch supports the proposed amendment confirming that 'workplace rights' apply to persons which includes employees, employers and contractors, JobWatch is concerned that the proposed amendment doesn't go far enough.

Protecting employees of independent contractors in labour hire arrangements

Currently under the FW Act, it is unclear whether employees of independent contractors are protected from adverse action when that adverse action has been taken by the principal of the independent contractor i.e. the host employer.

JobWatch submits that Section 342 of the FW Act currently provides unclear direction regarding remedies available to employees of independent contractors when working in labour hire arrangements.

In the obiter finding of Vice President Lawler, in *Mr Makram Louka v Centrelink* [2010] FWA 6827, section 342 (3) (d) can be read as providing protection for employees of contractors who have effectively had their services

terminated by the principal with whom the contractor has entered into for a contract for services. Subsection (d) *'must be taken to encompass a refusal to make use of services offered by an independent contractor in the form of services provided by that contractor through a particular employee of, or subcontractor to, that contractor. An alternative construction would render otiose, the words in 342 3 Column 1.*[2]

However, JobWatch submits that clear direction on the correct interpretation of s 342 is not yet available and that the proposed amendment in the Bill does not adequately protect employees of independent contractors who work at the principal/host. This is because, in practice, the independent contractor's employee is simply returned by the host to the independent contractor and a different employee is sent by the independent contractor to the host. Arguably, in this scenario, no adverse action has been taken against the independent contractor but adverse action has been taken against the independent contractor's employee.

Job Watch proposes that s 342 3 (a) and (d) of the FW Act be amended as follows:

1. **terminates the contract; <u>or ceases to use an employee of the contractor</u>**
2. **refuses to make use of, or agree to make use of, services offered by the independent contractor; <u>or an employee of the contractor</u>**

Thank you for considering our concerns.

Yours sincerely,

<u>JOB WATCH INC</u>
Per:

Zana Bytheway
Executive Director

2 Vice President Lawler, Mr Makram Louka v Centrelink , para 9 <http://www.fwa.gov.au/FWAISYS/isysquery/803e4ef0-0e96-40fa-a18d-86f174235bd2/3/doc/>